FILED
OCT 23 1935
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 262

In the Supreme Court of the United States

OCTOBER TERM, 1935

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

ST. LOUIS UNION TRUST COMPANY, A CORPORATION,
AND WILLIAM EDWIN GUY, EXECUTORS OF THE
ESTATE OF WILLIAM EVANS GUY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulations involved	3
Statement	3
Specification of errors to be urged	9
Summary of argument	9
Argument:	
I. The death of the decedent was the generating source of title to the corpus of the trust estate transferred to the beneficiaries	11
II. The transfers in question were made in contemplation of death and were substitutes for a testamentary disposition	17
Conclusion	24
Appendix	25

CITATIONS

Cases:	
Chase Nat. Bank v. *United States*, 278 U. S. 327	16
Farmers Loan & Trust Co., v. *Bowers*, 68 F. (2d) 916, certiorari denied, 293 U. S. 565	22
Heiner v. *Donnan*, 285 U. S. 312	16, 20
Helvering v. *Duke*, 290 U. S. 591	12, 16, 17
Helvering v. *St. Louis Union Trust Co. (Orthwein Estate)*, No. 25, Oct. Term, 1935	11, 12, 17
Helvering v. *Taylor*, 293 U. S. 507	18
Hertz v. *Woodman*, 218 U. S. 205	17
Klein v. *United States*, 283 U. S. 231	13, 14, 15, 17
McCormick v. *Burnet*, 283 U. S. 784	12, 16, 17
Milliken v. *United States*, 283 U. S. 15	18, 20, 21
Nichols v. *Coolidge*, 274 U. S. 531	20
Reinecke v. *Northern Trust Co.*, 278 U. S. 339	16
Saltonstall v. *Saltonstall*, 276 U. S. 260	16
Tyler v. *United States*, 281 U. S. 497	16
United States v. *Wells*, 283 U. S. 102	20
Statute:	
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302 (U. S. C. App., Title 26, Sec. 1094)	25
Miscellaneous:	
Treasury Regulations 70:	
Art. 17	26
Art. 18	26

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 262

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

ST. LOUIS UNION TRUST COMPANY, A CORPORATION, and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There was no opinion by the District Court. The opinion of the Circuit Court of Appeals (R. 41) is reported in 76 F. (2d) 851.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 13, 1935. (R. 58.) A petition for rehearing was filed April 12, 1935 (R. 59), and denied on April 19, 1935 (R. 62). The petition for a writ of certiorari was filed July 19, 1935, and granted October 14, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent declared himself trustee of certain personal property for each of his four children in four identical trust instruments. He reserved to himself as trustee the same rights and power in respect to the management of the trust property that he had with respect to property owned absolutely by him. Each trust instrument provided that if the beneficiary should die before the settlor, the trust property should revert to the settlor and become his immediately and absolutely; or if the settlor should die before the beneficiary, then the trust property should become the beneficiary's immediately and absolutely, and in either case the trust should cease. The question presented is:

Whether the property so transferred in trust by the decedent should be included in his gross estate because the transfer (a) was intended to take effect in possession or enjoyment at or after the settlor's death or (b) was made in contemplation of death,

within the meaning of Section 302 (c) of the Revenue Act of 1926.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 25, 26.

STATEMENT

The facts, as found by the District Court (R. 13–16), may be summarized as follows:

In 1921, William Evans Guy, the decedent, who was then 77 years old, executed four separate declarations of trust by the terms of which he conveyed to himself as trustee certain securities for the benefit of each of his four children. (R. 13.) The four declarations of trust were identical in form with the exception of the name of the party for whose benefit the trust was created. (R. 14.) They gave the settlor the same rights and power in respect to the management and control of the trust property as he had with respect to property owned absolutely by him. (R. 14–15.) The settlor, who was also the trustee, could pay the beneficiary as much of the income as he saw fit. Any income not distributed was added to the principal. (R. 15.)

The declaration of trust for Evelyn S. Guy is typical of each of the trusts, and, so far as pertinent, is as follows (R. 14–15):

> I, William Evans Guy, of the City of St. Louis, and State of Missouri, hereby declare, this third day of January, 1921, that

I hold in trust for my daughter, Evelyn S. Guy, the following property, to wit:

[Here follows description of securities]; with the powers and for the uses and purposes hereinafter set forth as follows:

1. I am to have the power at any time, and from time to time, to sell, any of the trust property or estate, for such price and prices as I may determine; any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable for trust property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the sums so borrowed by pledge or mortgage of any and all portions of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the sums so borrowed, I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income

and profits arising from the trust estate therein created. It being my intention to retain *as trustee* [italics ours] such rights, power, and authority in respect to the management, control, and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation and management; and all other reasonable or necessary charges incident to the administration of the trust created hereby, and out of the remaining income and revenue, I am to pay the beneficiary of this trust an allowance of $300 a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allowance increased or decreased, I shall have the power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support, and education of said beneficiary. Any income not distributed as hereinabove provided shall be added to the principal of the trust estate.

3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income or revenue, I shall have power to use as much of the prin-

cipal of said trust estate as may be absolutely necessary.

4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

5. The foregoing provision for my said daughter, Evelyn S. Guy, shall be for her sole and separate use, free from all statutory and marital rights of her husband; and free from her debts and without the right on her part to assign, pledge, hypothecate, or anticipate, or in any way create a lien upon any of the income or corpus of the trust estate hereby created before she shall receive the same, nor shall any of the said income or corpus be subject to any claims of any persons who may be at any time creditors of my said daughter.

6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease.

At the time of the execution of the declarations of trust, the decedent was a retired business man but was active in the management of his personal investments; was under the care of a physician, for usual minor ailments, from 1917 until 1928 when

he died; was having periodic physical examinations made by the Life Extension Institute; was normally interested in longevity, and had many times stated that he expected to live to be 90 years of age. At the time of the creation of the trusts, the decedent was a widower, the father of four children, all of whom were then over the age of 21 years, and each of whom was made the sole beneficiary in one of the separate trusts. (R. 13–14.)

The decedent originally transferred bonds of a par value of $72,000 to each of the four trusts, and from time to time made additions to each of the trusts, so that at the time of his death the property held by the four trusts was of the aggregate value of $994,195. The Commissioner of Internal Revenue determined that this amount should be added to the gross estate, which resulted in the additional tax of $94,022.25. The estate paid this amount and upon the rejection of a claim for refund filed suit. The jury was waived and the cause submitted to the court. (R. 13–14.)

The District Court found as a fact that the property in the trusts would have reverted to the decedent in the event of the death of the named beneficiary prior to the death of decedent and that none of the beneficiaries named in the trust instruments acquired custody, control or title to the property held in trust until the death of the decedent; that the title to the beneficiaries was contingent

upon their survival of the decedent; and that the motive of decedent in creating the trusts was to decrease his income tax by distributing a portion of his property among the four trusts, thus to avoid the high rate for large incomes, and at the same time to make provision for the distribution of the property to his children at decedent's death. (R. 16.)

The District Court concluded as a matter of law that the property constituting the corpus of the four trusts was transferred in contemplation of death and that the transfer was intended to take effect in possession or enjoyment at or after his death. Therefore, it was held that the value of the trust property was properly included in his gross estate. (R. 16.)

The Circuit Court of Appeals reversed the decision of the District Court and held both that the transfers were not intended to take effect in possession or enjoyment at decedent's death, and that there was no evidence to sustain the Commissioner's determination and the trial court's finding and conclusion that the transfers were made in contemplation of death. (R. 41–58.) Specifically, it held the decedent was actuated by two motives: (1) to make his children independent; (2) to avoid high surtaxes upon his income. Also, that evidence was lacking that decedent was influenced by the thought of death. (R. 58.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the transfers by trust were not made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. In holding that the transfers by trust were not intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926.

3. In failing to hold that the value of the property which had been transferred in trust should be included in the gross estate of the decedent under Section 302 (c) of the Revenue Act of 1926.

4. In reversing the decision of the District Court.

SUMMARY OF ARGUMENT

1. The instruments in question, each denominated "declaration of trust," are intended, (1) to provide a definite source of income for the decedent's children during the period of his life, such trusts terminating, in any event, at his death, and (2) to provide for the devolution of the property upon the termination of trusts at his death. The provision for such devolution is a substitute for a testamentary disposition. It is no longer open to doubt that such substitutes are within the purview of the statute. His death, and not the transfer to him as trustee, was the generating source of title to the corpus of the property theretofore transferred. Furthermore, his death resulted in a shift-

ing, or in the completion of a shifting, to the donee of the economic benefits of the property. Therefore, the property is subject to the death tax.

2. The transfers were made in contemplation of death. The Commissioner so determined and the District Court sustained the determination. The burden of proof is upon the taxpayer to overcome the presumption of the correctness of the Commissioner's determination. This they can do only by showing that the decedent was actuated by a life motive in making them. The life motives of the decedent to provide a definite source of income for his children and to reduce surtaxes during his life have reference to the creation of the trust estates only in so far as they subserve such purposes. Any motive to accomplish such purposes after his death, by a disposition made to take effect only upon the termination of the trusts at death, would obviously be one connected with death and is such a motive as ordinarily impels persons to make formal testamentary dispositions. The trial court found that one of the decedent's motives was "to make provisions for the distribution of the property to his children at decedent's death," and concluded that the transfers were therefore made in contemplation of death. These are reasonable inferences and conclusions from the record.

ARGUMENT

I

THE DEATH OF THE DECENDENT WAS THE GENERATING SOURCE OF TITLE TO THE CORPUS OF THE TRUST ESTATE TRANSFERRED TO THE BENEFICIARIES

There are presented in the instant case two questions: whether under the provisions of Section 302 (c), Revenue Act of 1926, a transfer of property, under the form of instrument involved here, (a) was intended to take effect in possession or enjoyment at or after the death of the settlor, or (b) was made in contemplation of death.

The first question is essentially the same as that presented in *Helvering* v. *St. Louis Union Trust Co.* (Estate of William J. Orthwein), No. 25, October Term, 1935, hereinafter referred to as the *Orthwein* case, and involving the proper construction and application of the corresponding provision of the Revenue Act of 1924. So far as now material, the provisions of the Revenue Acts are the same. The attention of the Court, therefore, is respectfully invited to the discussion and argument on behalf of the Commissioner of Internal Revenue in the *Orthwein* case, which is expressly adopted and incorporated herein by reference as being in all essential respects applicable and controlling upon the present facts.

The determination of the Commissioner of Internal Revenue in the instant case, as well as in the

Orthwein case, is based upon the significant fact that *not until the death of the settlor prior to that of the beneficiary did there arise in the beneficiary the absolute and unconditional right to the corpus of the property theretofore transferred.* Prior to his own death, there remained in the decedent a substantial interest in the corpus of the transferred property, represented by his right to retake such corpus upon the death of the beneficiary. Upon the settlor's death the possibility of his recovering the corpus was removed and the right of the beneficiary thereto became absolute and complete. It is this salient and vital fact which distinguishes the instant case (and the *Orthwein* case) from all of the cases relied upon by the court below, with the exception of *McCormick* v. *Burnet*, 283 U. S. 784, and *Helvering* v. *Duke*, 290 U. S. 591. As pointed out in the Government's brief in the *Orthwein* case, the facts and the circumstances surrounding the decisions in the *McCormick* and *Duke* cases do not require a like result here.

By the declarations of trust, the decedent merely transferred certain securities to himself as trustee for the period of his life, in trust for his children. By the terms of the instruments these trusts were terminable at the settlor's death, though any one of the trusts might be sooner terminated if the beneficiary thereof predeceased him. The only provision with respect to the transfer of the *corpus* of the estate to the beneficiaries is contained in the last paragraph of the instrument, and is to the

effect that in the event a beneficiary survived the settlor, the property should be delivered to such beneficiary.

It is thus apparent that the trusts created merely a life estate in the corpus for the purpose of providing income for the settlor's children during his lifetime. His avowed motive for creating them bears out this conclusion, for he told his son that he "wanted to get rid of the nuisance" of treating his children as such, and having to make them allowances; that he wanted them to be independent, so that they would know what they were going to get each year; that he also wanted to avoid high surtaxes, and felt that it was justifiable to distribute the income, making each of the children the owner of an independent income, and requiring them to pay the tax thereon. Clearly, therefore, the beneficiaries took merely estates for the life of the grantor. Only upon decedent's death, prior to that of the beneficiary, did there arise in the latter an absolute and indefeasible right to take the corpus of the transferred property. It follows that the decedent's death, and not the transfer of the securities to him as trustee, was the generating source of his children's title to the corpus of the property.

The facts in the case at bar are especially similar to those before this Court in *Klein* v. *United States*, 283 U. S. 231. We submit they bring the instant case squarely within the principle of the *Klein* case. There the decedent had by deed conveyed certain property to his wife for her life, a reversion being

reserved to him in the fee; the conveyance being upon the further condition that the grantee thereunder by virtue of the conveyance take the fee simple only in the event that she survived the grantor. This Court held that the grant was contingent, only a life estate being thereby vested in the wife, with an express reservation of the fee by the grantor which remained vested in him in the event the grantee should die before him, the grantee taking the fee only in the event that she should survive him. It will be noted that, though the conveyance was made to the wife, the express reservation of the fee limited the grant to a life estate, with the result that, as the Court pointed out (p. 234):

> * * * the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.

The statute referred to was that portion of Section 402 (c) of the Revenue Act of 1918, which, similarly to Section 302 (c) of the Revenue Act of 1926, here applicable, required the inclusion in the gross estate for estate-tax purposes of property in respect of which the decedent had made a transfer or created a trust to take effect in possession or enjoyment at or after death.

The only difference between the two cases is that in the *Klein* case there was an express reservation

of the fee by the grantor individually, whereas in the case at bar the fee was held by the grantor as trustee. That is merely the difference between a transfer by deed and a transfer in trust. We submit that difference cannot affect the result for the statute, in terms, applies to both alike. Here, as in the *Klein* case, the condition of the beneficiaries receiving title to the corpus of the estate depended solely upon their surviving the decedent. In the *Klein* case the provision was that (p. 233):

> Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple,

In the case at bar, the provision is that (R. 15):

> * * * if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her * * * .

Like the grantee in the *Klein* case, the beneficiaries here took only a life interest in the income of the transferred property. Their interest in the corpus was contingent, and "whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen *before* that of the grantee" (p. 233).

Moreover, this Court has laid down the rule in cases involving similar transfers of property intended to take effect in possession or enjoyment

at or after the grantor's death, that where, as here, the death of the decedent results in a shifting, or in the completion of the shifting to the donee of the economic benefits of property, such property is subject to the death tax. *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 338; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 346; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 270–271; *Heiner* v. *Donnan,* 285 U. S. 312, 322–323. As was pointed out by this Court in *Tyler* v. *United States,* 281 U. S. 497, 503, the question is—

> * * * whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

Clearly, in the instant case, the removal of the condition precedent (death of the settlor) was the occasion which ripened, or brought into being, the right of the beneficiaries to receive the corpus.

None of the decisions of this Court, cited by the court below as authoritative, are believed to be controlling in the case at bar, since in none of them (with the exception of the *McCormick* and *Duke* cases) did the grantor reserve the right to retake the corpus upon the death of the beneficiary prior to his own.

For the reasons stated in the Government's brief in the *Orthwein* case, *supra,* it is submitted the *McCormick* case does not require a result in the instant case similar to the one reached there.

While the facts in the case at bar are essentially the same as presented in the *Duke* case, *supra,* the result there is not authoritative upon the question involved herein and has no binding effect as a precedent. *Hertz* v. *Woodman,* 218 U. S. 205. Furthermore, this Court would scarcely have so divided in the *Duke* case if the *McCormick* decision had settled the question.

Since neither the *McCormick* nor the *Duke* case can be considered as having decided the issue herein, and since no other decision of this Court, with the exception of the *Klein* case, deals with an interest retained in the corpus of transferred property, the adoption of the suggested construction of the statute will not require the reversal or modification of any prior decision.

II

THE TRANSFERS IN QUESTION WERE MADE IN CONTEMPLATION OF DEATH AND WERE SUBSTITUTES FOR A TESTAMENTARY DISPOSITION

In the instant case, the Commissioner determined, among other things, that the transfers were made in contemplation of death. The District Court found as a fact that decedent's motive in creating the trusts was to decrease his tax on the *income* of the transferred property and, at the

same time, to make provision for the distribution of the property (*corpus*) to his children at his death. The District Court concluded, as a matter of law, "that the property constituting the corpus of the four trusts was property of which the decedent made a transfer in contemplation of death."

There is no question here of the application of either the rebuttable or conclusive two-year presumption provided by the pertinent provision of the Revenue Act of 1926, since the transfers here were made seven years prior to decedent's death. Nevertheless, the determination of the Commissioner carries a presumption of correctness and, unquestionably, the burden of proof is on the taxpayer to show that the Commissioner's determination is invalid. *Milliken* v. *United States*, 283 U. S. 15, 19; *Helvering* v. *Taylor*, 293 U. S. 507.

The court below based its reversal of the District Court's finding, that the transfers were made in contemplation of death, upon the evidence that the decedent, in making these trusts, was actuated by two motives: (1) to make his children independent; (2) to avoid high surtaxes upon his income. The court further declared evidence was lacking that decedent was in any way influenced by the thought of death.

It is submitted the grounds stated fall far short of sustaining the Circuit Court's decision. In the first place, the indicated motives to reduce surtaxes and to provide an adequate income for his children during his life could only have inspired, and could

obviously have reference only to, the creation of the trust estates insofar as they subserved such purposes. This was wholly accomplished by paying the beneficiaries the income for the period of the settlor's life. The tax here is upon the transfer of the corpus that was withheld from the beneficiaries until the decedent's death. Accordingly, so far as the corpus is concerned, the decedent had no motive associated with his own life. On the contrary, it was associated with his death, and this is properly treated as a testamentary disposition. Furthermore, although the Court declared evidence was lacking that decedent was actuated by any thought of death, such motive clearly appears from the actual disposition of the corpus to take effect at, and not before, decedent's death.

The Circuit Court of Appeals evidently meant that decedent was not thinking of the imminence of death. It appears clear, however, that he was contemplating the consequences of his death and accordingly made provision for his children to succeed to his property upon that event. The evidence showed a purpose associated with death; and there was shown no positive motive of the grantor, with respect to the transfers of the corpus of the property, sufficient to overcome the presumption of correctness attaching to the Commissioner's determination that they were made in contemplation of death.

In these circumstances, we submit that the findings of the trial court are supported both by the

evidence of the actual transfers to take effect at death and by the presumption of correctness which attaches to the Commissioner's determination. Thus, the transfers are brought squarely within the well established principle that transfers of this kind are made in contemplation of death, within the meaning of the statute, where the dominant motive therefor is shown to be one associated with death. *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Milliken* v. *United States, supra,* at p. 23; *United States* v. *Wells,* 283 U. S. 102, 116–117; and *Heiner* v. *Donnan, supra.*

In *Milliken* v. *United States, supra,* this Court had for consideration the correctness of the Commissioner's determination that a gift of stock, wholly completed, and transferred by the decedent to his children in 1916 (four years prior to his death) was a transfer in contemplation of death under the like provision of the Revenue Act of 1918. The finding of the Commissioner was held to be controlling in the circumstances, since it was not overcome by any evidence to the contrary. With respect to the aim of the statute, this Court declared (p. 23):

> It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with

> testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death.

Here, the transfers of the *corpus* were not completed until the death of the decedent and the facts are insufficient to show that, as to the corpus, the grantor was actuated by any motive other than contemplation of death.

The District Court found two motives, one associated with life (to avoid payment of surtaxes and make his children independent), and the other associated with death (to provide for distribution of property upon death) (R. 16). As pointed out above, the Circuit Court of Appeals is in error in holding that the evidence did not sustain the second motive.

Accordingly, the question is which motive predominated? (Cf. *Milliken* case, *supra.*) This question is answered by the Commissioner's determination; no evidence overcame it, and the District Court did not disturb it. The Circuit Court of Appeals could not weigh the evidence and decide otherwise.

Therefore, we submit that there is no basis upon which the District Court's decision could be reversed.

It is submitted the decision of the court below conflicts in principle with the decision of the Second Circuit Court of Appeals in *Farmers' Loan & Trust Co.* v. *Bowers* (Astor case), 68 F. (2d) 916, certiorari denied, 293 U. S. 565. While in the so-called "Astor case" the decedent died within a two-year period subsequent to making the transfers of trust, and the burden was on the taxpayer to overcome the presumption of the statute that the transfers were made in contemplation of death, it appeared that two motives actuated the decedent in transferring the property involved therein. These motives were, first, to avoid the payment of taxes (income and capital levy) during his own lifetime; and, second, the payment of estate taxes at his death. As in the present case, the transfers of the corpus were intended to take effect at the time of his death. The Circuit Court of Appeals held that the transfers were within the intendment of the statute, as construed by this Court in the *Nichols, Milliken, Wells,* and *Donnan* cases *supra.* In reaching its conclusion, the Second Circuit Court of Appeals pointed out (pp. 923–924):

> There were two or more motives for transfer established, each of which substantially induced the making of the gift, and since it is impossible to determine any one single dominating, controlling, or impelling motive, the taxpayer has failed in sustaining the burden of proof. Where the donor

makes a gift to accomplish some purpose to be effective during his lifetime and at the same time to accomplish a purpose to be effective at his death, each one of which substantially induces the transfer and is part of the inducing element going into making the gift, each of the motives becomes an inducing, actuating, and determining cause. Therefore each is controlling and each is compelling. In such case section 402 (c) is applicable, for the intent or motive to evade the tax is present.

* * * * *

* * * The same specific motives of generosity or a desire to see children independent may be present, but in addition there is present a definite and positive state of mind contemplating death. It is that state of mind which is inseparable from acts of testamentary disposition. That contemplation to some extent constitutes a specific motive of the transfer. Other specific motives, such as a testamentary scheme to save the estate tax may be present and, unlike the usual motives of generosity or protection of dependents, point strongly to the presence of the motive of contemplation of death not completely expressed.

* * * Where the motive associated with the contemplation of death appears equally or substantially with the motives associated with contemplated continued life, nothing that was said in the Wells Case offers a rule for choice of a dominant motive. It is in

just such a case as this, if death follows the material transfer within two years, that the presumption set up by the statute properly operates and the taxpayer must prove that the gift was not made in contemplation of death.

Since, in the instant case two motives were found to have impelled the transfers, and it has not been shown that the life motive predominated, the fact that these transfers of the corpus were made to take effect at death (in fact, were substitutes for testamentary dispositions) brings the transfers within the intendment of the statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

STANLEY REED,
Solicior General.
FRANK J. WIDEMAN,
Assistant Attorney General.
DAVID E. HUDSON,
SEWALL KEY,
MAURICE J. MAHONEY,
Special Assistants to the Attorney General.

OCTOBER 1935.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. * * *

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of

powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C. App., Title 26, Sec. 1094.)

Treasury Regulations 70, promulgated under the Revenue Act of 1926 (1929 ed.):

ART. 17. *General.*—All transfers made by the decedent subsequent to September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of property or interest so transferred must be returned as a part of the gross estate.

ART. 18.

* * * * *

Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the decedent's life to someone other than himself. Example: The decedent transferred property to his son, the latter to receive the income during the decedent's life or agreeing to pay the income to his mother during the decedent's life. The transfer to the son in either case is taxable.

U. S. GOVERNMENT PRINTING OFFICE: 1929